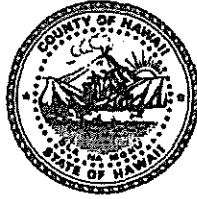


Harry Kim
Mayor



Christopher J. Yuen
Director

Brad Kurokawa, ASLA
LEED® AP
Deputy Director

County of Hawaii
PLANNING DEPARTMENT

101 Pauahi Street, Suite 3 • Hilo, Hawaii 96720-4224
(808) 961-8288 • FAX (808) 961-8742

February 4, 2008

Ms. Johanna H. Brown
P. O. Box 4248
Kailua-Kona, HI 96745

Dear Ms. Brown:

SUBJECT: VARIANCE-VAR 07-081
Representative: JOHANNA H. BROWN
Applicant: JOHANNA H. BROWN
Owners: WAYNE MONTWHEELER, ET AL.
Request: Variance from Chapter 25, Zoning
Minimum yards
Tax Map Key: 8-7-015:022, Lot 36

After reviewing your variance application, the Planning Director certifies the approval of VARIANCE-VAR 07-071 subject to variance conditions. The variance allows portions a water tank and attached deck to remain, "as-built", on Lot 36 with minimum 5.80 feet to minimum 7.17 feet front yard and attendant minimum 5.80 feet to minimum 7.17 feet front yard open space in lieu of minimum 15.00 feet front yard and attendant minimum 10.00 feet front yard open space according to variance application's site plan or survey map dated October 9, 2007. The variance is from the TMK property's minimum yards pursuant to Hawaii County Code, Chapter 25, Zoning, Article 5, Division 7, Section 25-5-76, Minimum yards, (a), and Section 25-5-77, Other regulations, and Article 4, Division 4, Section 25-4-44, Permitted projections into yards and open space requirements, (a).

BACKGROUND AND FINDINGS

1. **Location.** The referenced TMK property, Lot 36 containing 6531 square feet, is within Kona Paradise Subdivision and situated at Kaohe 4th, South Kona, Hawaii. The referenced TMK property's address is 87-3197 Ama Road.

The property is zoned Agricultural (A-5a) by the County and designated Agriculture or "A" by the Land Use Commission (LUC).

2. **Variance Application-Site Plan**. The applicant submitted the variance application, attachments, and filing fee on November 28, 2007. The variance application's site plan map is drawn to scale and prepared by The Independent Hawaii Surveyors, LLC. The variance site plan map, dated October 9, 2007 denotes portions of the "DECK" and portions of "WATER TANK" below the Deck were built into the minimum 15 feet front yard of "LOT 36" or subject TMK property.

The applicant's submitted following background information dated November 28, 2007 states in part:

"This is a request for the walkway/deck to remain "as built". The current deck has a projection of 9.40' into the 15' front yard set back with the walkway having a 14.76' projection into the 15' set back. The walkway/deck is open top with no wall or roof projection into the 15' set back. The request is based on special circumstances that are applicable to this property as set forth below.

Special or unusual circumstances apply to this request. The water catchment tank was an existing structure that is situated at the optimum placement relative to the grade and slope level of the home. The deck was built in the only efficient way to allow for support of the walkway/deck due to the slope of the parcel and the proximity of the driveway. Please refer to enclosed photos.

We respectfully request the granting of this variance. Without the granting of this variance, access to the front entrance door will no longer exist; the pending building permit of the walkway/deck cannot be finalized thus causing the owners of this property to continue to be fined \$25.00/day by Kona Paradise Association adding greatly to the economic burden this property is becoming for the owners. The property was purchase by the Montwheelers with the understanding that no open permits existed. This condition has turned out not to be the case. Open permits have been or are being satisfied with the efforts of Taylor Built Construction, Bob Taylor-929-8112. The granting of this variance would be accepted by the Board of the Kona Paradise Association and would also would (sic) allow the owners to become in compliance with County requirements to the best of their ability due to the special and unusual circumstances of the property."

In addition to the above, the applicant's letter dated January 29, 2008 states in part the following:

"Pursuant to a recent request by your staff, please note the Taylor Built Construction will submit detailed building plans for the deck and walkway ("as built") identified on the variance site plan map for approval by the DPW-Building Division of Kona." (sic)

Note: The applicant's representative sent a follow-up notice dated December 5, 2007 correcting the TMK parcel number to surrounding property owners. The variance site plan map dated October 9, 2007 does not identify the location of the Independent Wastewater System (IWS) or cesspool. The variance request does not address the location or position of fencing and landscaping, etc. along or straddling common boundary lines.

3. **County Building Records:**

The Hawaii County Real Property Tax Office records show 5-Building Permits (04507, 925710, 985989, B2004-0699K, B2005-0143K), 3-Electrical Permits (EK04001, E995351, E2004-1227K), and 4-Mechanical (MK03864, MK06303, MK03909, M990413) or Plumbing Permit were issued to subject TMK property. It appears that the dwelling, water tank, and deck on "LOT 36" were built pursuant to these building and associated construction permits issued between 1980 and 2005.

4. **Agency Comments and Requirements-VAR 07-081:**

- a. The State Department of Health (DOH) memorandum dated December 17, 2007 states:

"The Health Department found no environmental health concerns with regulatory implications in the submittals."

- b. The Department of Public Works (DPW) memorandum dated December 17, 2007 states in part:

"We reviewed the subject application and have no comments or objections."

5. **Notice to Surrounding Property Owners.** The applicant submitted copies of notice sent surrounding property owners together with mailing receipts affixed to a list of surrounding property owners. For the record, the first notice and correction notices were mailed on November 28, 2007 and December 6, 2007, respectively; and, second notice was mailed on December 17, 2007 according to the mailing receipts attached to the notices sent to surrounding property owners. Notice of this application was published in the Hawaii Tribune Herald and West Hawaii Today on December 12, 2007.

6. **Comments from Surrounding Property Owners or Public.** No further written agency comments were received. No written objections from surrounding property owners or the general public were received. The applicant submitted letter(s) dated December 15, 2007 signed by 10 and 4 surrounding property owners, respectively, or 14-neighbors supporting the applicant's variance application; and, copy of email dated December 19, 2007 supporting the applicant's request for the variance file. In addition, the Planning Department received telephone calls supporting the applicant's request for variance from 2-surrounding property owners on or about December 10, and December 12, 2007.

SPECIAL AND UNUSUAL CIRCUMSTANCES

The applicant, on behalf of the current owners, submitted the variance application to address or resolve the water tank and deck encroachments within the property's minimum 15 feet front yard. The variance application's site plan map was prepared by a surveyor and denotes the location of the dwelling, water tank, deck and other site improvements, "as built", on "LOT 36". It appears the current owners became aware of building encroachment and permit issues after they purchased the property. No evidence has been found to show indifference or premeditation by previous owners or builders to deliberately create or intentionally allow these building encroachments to be built within the affected front yard and minimum front yard open space.

It appears that the existing dwelling improvements and subsequent dwelling improvements were constructed according to 4-building permits and other associated construction permits issued to subject TMK property. It appears that during construction of the dwelling and associated building improvements between 1980 and January 2005, the water tank and open deck encroachment within the property's (front/rear/side) yards went unnoticed by the builders and agencies.

ALTERNATIVES

Alternatives available to the applicant to correct and/or address the building encroachments constructed into the affected yards of the subject TMK property include the following actions:

1. Remove the building encroachments or redesigning or relocating the water tank/deck to fit within the correct building envelope prescribed by the Zoning Code.
2. Consolidation of Lot 36 with the right-of-way (Ama Road) fronting the subject TMK property and resubdivision to modify the property's front boundary lines and adjust minimum yards, etc.

INTENT AND PURPOSE

The intent and purpose of requiring building setbacks within a subdivision are to assure that adequate air circulation and exposure to light are available between permitted structure(s)/uses and boundary/property lines.

It appears that the subject building encroachments constructed between 1980 and 2005 within the minimum front yard are not physically and/or visually obtrusive from the surrounding properties or privately owned right-of-way (Ama Road). According to letter's supporting the applicant's request for variance, it appears that the water tank's location and deck's position including the walkway location into the TMK property's front yard do not depreciate or detract from the character of the surrounding neighborhood and surrounding land patterns. Therefore, it is felt that portions of the water tank/deck constructed into the property's front yard and identified on the variance application's site plan map will not detract from the character of the immediate neighborhood or the subdivision.

The subject variance application was acknowledged by letter dated December 5, 2007 and additional time to incorporate further information and status of a building permit related to completed deck and walkway improvements was necessary. The applicant agreed to an extension of time to incorporate this information into the variance background report and granted the Planning Director an extension of time to render decision on the variance application-VAR-081 to February 8, 2008.

Based on the foregoing findings, this variance request would be consistent with the general purpose of the zoning district and the intents and purposes of the Zoning Code, Subdivision Code and the County General Plan. Furthermore, the variance request will not be materially detrimental to the public's welfare and will not cause substantial adverse impact to the area's character and to adjoining properties.

PLANNING DIRECTOR'S DECISION AND VARIANCE CONDITIONS

This variance application is approved subject to the following variance conditions:

1. The applicant/owner, their assigns or successors shall be responsible for complying with all stated conditions of approval.
2. The applicant/owner(s), successors or assigns shall indemnify and hold the County of Hawaii harmless from and against any loss, liability, claim, or demand for the property damage, personal injury, or death arising out of any act or omission of the applicants/owners, their successors or assigns, officers, employees, contractors, or agents under this variance or relating to or connected with the granting of this variance.
3. Portions of the water tank/deck located on "LOT 36" will not meet the minimum front yard and minimum front yard open space requirements pursuant to Chapter 25, the Zoning Code, according to the variance application's site plan map dated October 9, 2007. The approval of this variance permits the "WATER TANK" and "DECK" to remain, "as built, on the subject TMK property or "LOT 36" according to the variance site plan map.

The applicant or current owners shall confer with the DPW-Building Division in Kona regarding the permit status of portions of "DECK" upon the "WATER TANK" and other site improvements (walkway) identified on the variance site plan map; and, if necessary or required by the DPW, secure a building permit for "DECK" situated upon the "WATER TANK" and/or portions of the "DECK" and walkway, "as built" upon the subject TMK property.

4. No permit shall be granted to allow an ohana dwelling or building permit issued to allow construction of an "ohana" dwelling shall be granted to the subject TMK property, subject to provisions of the Zoning Code or State Law which may change from time to time.
5. Future building improvements or building improvements and permitted uses shall be subject to subject variance-VAR 07-081 and State law and County ordinances and regulations pertaining to building construction and building occupancy.

Ms. Johanna H. Brown
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Should any of the foregoing conditions not be complied with, the Planning Director may proceed to declare subject Variance null and void.

Sincerely,



CHRISTOPHER J. YUEN
Planning Director

WRY:cs
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xc: Real Property Tax Office-(Kona)
KPPOA-Architectural Review Committee